UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 30th day of December 1996

Western Pacific Airlines, Inc.
Mountain Air Express, Inc.
Violations of 49 U.S.C. §§ 41101, 41712 and 14 CFR 201.5

Served December 30, 1996

CONSENT ORDER

This consent order concerns unauthorized advertising and sales of flights between Colorado Springs, Colorado, and other Colorado destinations by Western Pacific Airlines, Inc., a certificated air carrier, and Mountain Air Express, Inc., an applicant for certification as an air carrier (WestPac and MAX), that constitute violations of 49 U.S.C. §§ 41101 and 41712 and 14 CFR 201.5. This order directs MAX, and its affiliate, WestPac, to cease and desist from future similar violations and to pay compromise civil penalties.

WestPac is a Colorado-based carrier that operates domestic scheduled passenger air transportation using Boeing 737 aircraft. On August 30, 1996, MAX, a carrier in which WestPac holds the greatest interest, filed an application for certificate authority pursuant to 49 U.S.C. § 41102 (OST Docket No. 96-1674). In addition, in September 1996, WestPac caused to be published in ***Colorado Business*** magazine[1] an advertisement announcing service by MAX between Colorado Springs and seven Colorado destinations.[2] At the time the advertisement was published, MAX

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[1] Under an Alliance Agreement dated September 27, 1996, between WestPac and MAX, WestPac has taken responsibility for MAX's advertising, marketing, reservations and ticket sales.

[2] The advertisement named seven ski resort towns—Hayden/Steamboat, Gunnison, Eagle (Vail), Aspen, Telluride, Montrose and Durango—as the destinations from Colorado Springs. MAX 's application states it plans to use Dornier 328-120 aircraft, which are 32-passenger turboprops that qualify as small aircraft under 14 CFR 298.2. Five of the airports to be served–Gunnison, Aspen, Telluride, Durango and Eagle (Vail)—are classified as "special category" facilities by the FAA (which entails special pilot-in-command qualifications, 14 CFR 121.445), and two of these—Telluride and Aspen—cannot accommodate large aircraft like the B-737 operated by WestPac.

had no authority to conduct or hold out domestic air service. Although no reservations were taken for transportation on flights by MAX,

WestPac took reservations and accepted payment for tickets from consumers, who were advised that they would be flying on WestPac, when in fact WestPac intended to place the passengers on MAX flights when MAX received its certificate authority.

Holding out or providing domestic air transportation without appropriate authority from the Department is a violation of 49 U.S.C. § 41101. From the standpoint of the requirements of section 41101, the holding out of service, as well as the actual operation of air service, constitutes "providing" air transportation. In addition, sections 201.5(a)(1) and (2) of the Department's rules provide, *inter alia*, that an applicant for certificate authority shall not advertise, list schedules or accept reservations until the application has been approved by the Department, and that the applicant shall not accept payment or issue tickets for the air transportation covered by its application until the authority has become effective (14 CFR 201.5). Holding out service without requisite authority is also an unfair and deceptive practice and unfair method of competition prohibited by 49 U.S.C. § 41712. Moreover, holding out air transportation as being provided by one carrier while intending to place passengers who book reservations on another carrier also constitutes an unfair and deceptive practice and unfair method of competition prohibited by 49 U.S.C. § 41712.[3] By engaging in the conduct described above, MAX violated 49 U.S.C. §§ 41101 and 41712, as well as 14 CFR 201.5. Through its ownership and control of MAX, WestPac, by engaging in the conduct described above, violated 49 U.S.C. §§ 41101 and 41712.

Furthermore, WestPac separately also violated 49 U.S.C. § 41712 when it published numerous advertisements for service to the ski resort towns in question featuring a picture of a WestPac B-737 aircraft, thereby leaving consumers with a reasonable expectation that service to the seven destinations would be on that aircraft, when in fact such service cannot be operated to two of those points. Under 49 U.S.C. § 46301, violations of 49 U.S.C. §§ 41101 and 41712 and of 14 CFR 201.5 may subject a carrier and its principals to civil penalties of up to $1,000 for each violation and $1,000 per day for each day each violation continues.

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[3] Such an activity is analogous to a violation of the Department's code share dis-closure rule, 14 CFR 399.88. Under that rule, an air carrier is required to provide infor-mation in any direct oral communication with a consumer concerning a code-shared flight sufficient to alert the consumer that the flight will occur on an airline different from the carrier whose code is used and to identify the carrier that will actually provide the service (14 CFR 399.88(2)). Here, WestPac held out service in its own name but failed to advise the affected passengers that it expected to place them on another carrier from Colorado Springs to the seven ski resort towns, or to obtain from the Department the exemption authority necessary for WestPac lawfully to advise those passengers that they would be accommodated on MAX flights once MAX was certificated.

In explanation, WestPac and MAX state that they believe their actions have complied with the Department's regulations, with the sole exception of the advertisement in *Colorado Business*, e.g., that reads "Take WestPac to the MAX." Both companies assert that they did not otherwise advertise or hold out any air service in MAX's or WestPac's name that was to be performed by MAX; nor did they make any ticket sales for air service to be performed by MAX. At the time of the ads, WestPac states, its existing authority could cover the new intra-Colorado service, and it was prepared to add the Dornier aircraft to its operations specifications and to operate the service if the certification of MAX was not completed by December 4, 1996, MAX's planned start-up date. Under their Alliance Agreement, WestPac is responsible for its own and MAX's marketing, advertising, reservations and sales. According to WestPac, the ads, reservations, and sales were made solely in WestPac's name, using WestPac's "W7" airline code, its "ticketless" confirmation procedures and its contract of carriage. Furthermore, MAX was not mentioned in WestPac's computer reservation system or sales confirmation materials, and as soon as WestPac heard from the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings (Enforcement Office), it ceased using the "WestPac to the MAX" advertising copy.

In mitigation and as an offset to the compromise assessment, WestPac has agreed to give each passenger who has purchased air transportation between Colorado Springs and the seven ski resort towns in question, through December 15, 1996 (or the date MAX begins operations, if later), a $25 discount travel coupon valid for credit toward the purchase of air transportation on WestPac or MAX.[4] These coupons will be valid for travel through May 1, 1998, although certain blackout dates will apply. The coupons can be redeemed at any Western Pacific airport ticket counter or city ticket office, or at any travel agency. Approximately 11,000 passengers are qualified to receive this coupon; therefore, if each one uses the coupon, the total value of the coupon program will reach $275,000.

The Enforcement Office has carefully considered the information provided by WestPac and MAX but continues to believe that enforcement action is warranted. In this connection, the Enforcement Office and WestPac and MAX have reached a settlement of this matter. WestPac and MAX consent to the issuance of an order to cease and desist from future violations of 49 U.S.C. §§ 41101 and 41712 and 14 CFR 201.5, and to the assessment of $340,000 in compromise of potential civil penalties otherwise assessable, except to the extent offset in accordance with the consumer benefit expenditure provisions contained in the ordering paragraphs of this order.

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[4] MAX received its air carrier authority on December 13, 1996, (Order 96-12-16) and it started operations on December 15, 1996.

Under the provisions, the allowed offset shall not exceed a total of $290,000. The resulting penalty amount shall be due as follows: one payment of $10,000 shall be due on July 1, 1997; two payments of $15,000 each shall be due on September 1, 1997, and December 1,

1997; and payment of the remainder, including any amount not offset, shall be due on February 1, 1998. We believe that this compromise assessment is appropriate and serves the public interest. It represents an adequate deterrence to future noncompliance with the Department's consumer protection requirements by WestPac and MAX, as well as by other air carriers and foreign air carriers.

This order is issued under the authority contained in 49 CFR 1.57a and 14 CFR 385.22.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;

2. We find that Mountain Air Express, Inc. (MAX) violated 49 U.S.C. § 41101 by publishing advertising, making reservations and selling tickets for domestic scheduled passenger air transportation without the requisite authority from the Department;

3. We find that Western Pacific Airlines, Inc. (WestPac), through its ownership and control of MAX, violated 49 U.S.C. § 41101 by publishing advertising, making reservations and selling tickets for domestic scheduled passenger air transportation by MAX without the requisite authority from the Department;

4. We find that MAX violated 14 CFR 201.5 by publishing advertising for domestic scheduled passenger air transportation before the Department had acted upon MAX's pending application (OST Docket No. 96-1674) for the requisite authority;

5. We find that WestPac, through its ownership and control of MAX, violated 14 CFR 201.5 by publishing advertising for domestic scheduled passenger air transportation on MAX before the Department had acted upon MAX's pending application (OST Docket No. 96-1674) for the requisite authority;

6. We find that by engaging in the conduct and violations described in paragraphs 2-5 above, MAX and WestPac also engaged in unfair and deceptive practices and unfair methods of competition in violation of 49 U.S.C. § 41712;

7. We find that WestPac published advertising, made reservations and sold tickets, and told those passengers that they would be flying on WestPac, when it intended to place those passengers on flights to be conducted by another carrier, MAX, in violation of 49 U.S.C. § 41712;

8. We find that WestPac published advertising that could lead a reasonable consumer to believe that the carriers would serve all the airports listed in the ads by large jet aircraft, namely the Boeing 737 depicted in the ads, when WestPac knew or should have known that two of those airports cannot accommodate such aircraft, in violation of 49 U.S.C. § 41712;

9. WestPac and MAX, and all other entities owned or controlled by or under common ownership with either of them, and their successors and assignees, are ordered to cease and desist from violations of 49 U.S.C. §§ 41101 and 41712, and 14 CFR 201.5, as described in paragraphs 2-8, above;

10. MAX and WestPac are assessed $340,000 in compromise of civil penalties that might otherwise be assessed for the violations found in ordering paragraphs 2-8 above. The $340,000 shall be due and payable in accordance with ordering paragraph 11, except to the extent offset in accordance with this paragraph. The permitted offset shall not exceed a total of $290,000. Failure to pay the compromise assessment as directed by this paragraph will subject MAX and WestPac to the assessment of interest, penalty, and collection charges under the Debt Collection Act, and possible enforcement action for failure to comply with this order:

    (a) MAX and WestPac may offset 1) the cost to them of any ticket on another air carrier that they purchase for any member of the affected group of consumers, less the amount paid by the member to WestPac for the air transportation in question; 2) the face value of any discount coupon for future air travel on MAX and WestPac that is redeemable for its face value through May 1, 1998, that MAX and WestPac provide free to any member of the affected group of consumers,[5] and 3) up to $10,000 of the costs associated with contacting ticketed passengers regarding the initiation of service by MAX. The applicable affected group of consumers shall include: any person who purchased before December 15, 1996 (or the date when MAX initiates operations, if later), a ticket for any air transportation on WestPac between Colorado Springs and the seven Colorado

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[5] *Inter alia,* the coupons will be valid through May 1, 1998, will be redeemable through travel agents as well as by MAX and WestPac, and will be subject to limited blackout dates.

destinations named in footnote one of this order, departing after December 14, 1996 (or the date when MAX initiates operations, if later);

(b) To avail themselves of an offset under this paragraph, MAX and WestPac must make available, within 60 days of the date of issuance of this order, detailed cost and accounting records substantiating the offset to the Assistant General Counsel for Aviation Enforcement and Proceedings, who will evaluate the adequacy of the submission. These records must include receipts showing the cost to MAX and WestPac of the substitute tickets on other air carriers and the amounts paid to WestPac as described above, as well as the face value of all coupons given to the affected group of consumers; and

(c) The Assistant General Counsel shall advise WestPac and MAX of the offset allowed within 30 days after WestPac and MAX provide the accounting and supporting records enumerated above. The Assistant General Counsel's decision shall be unreviewable; and

11. Payments shall be made by wire transfer through the Federal Reserve Communications System, commonly known as "Fed Wire," to the account of the U.S. Treasury. Of the total penalty amount to be paid—that is, $340,000 less up to $290,000 in offsets, as provided by ordering paragraph 10—one payment of $10,000 shall be due on July 1, 1997; two payments of $15,000 each shall be due on September 1, 1997, and December 1, 1997; and payment of the remainder, including any amount not offset, shall be due on February 1, 1998. The wire transfers shall be executed in accordance with the instructions contained in the Attachment to this order.

This order will become a final order of the Department 10 days after its service date unless a timely petition for review is filed or the Department takes review on its own motion.

BY:

ROSALIND A. KNAPP
Deputy General Counsel

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